

No. 89-1322

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

THE CITIZEN BAND POTAWATOMI INDIAN
TRIBE OF OKLAHOMA

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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March 22, 1990

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QUESTIONS PRESENTED

1. Whether the State of Oklahoma may assess an Indian tribe with a cigarette tax for cigarettes sold in Indian Country.

2. Whether an Indian tribe which files suit to enjoin an unlawful state tax assessment thereby waives suit immunity for a counterclaim seeking declarative and injunctive relief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
COUNTER-STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT	5
PROPOSITION I: THE TENTH CIRCUIT OPINION THAT OKLAHOMA MAY NOT ASSESS AN INDIAN TRIBE WITH A CIGARETTE TAX IS CONSISTENT WITH THE DECISIONS OF THIS COURT	8
a. Washington v. Confederated Tribes of Colville	9
b. State ex rel. May v. Seneca-Cayuga Tribe...	10
PROPOSITION II: THE DECISION BELOW APPLIED THE DOCTRINE OF SOVEREIGN IMMUNITY CONSISTENT WITH ALL PAST CASES..	11
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Bryan v. Itasca County, Minnesota</i> , 426 U.S. 373, 96 S.Ct. 2102 (1976).....	9
<i>C.M.G. v. State</i> , 594 P.2d 798 (Okl. 1979)	2
<i>California State Board of Equalization v. Chemehuevi Indian Tribe</i> , 474 U.S. 9, 106 S.Ct. 289 (1985).....	9
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202, 107 S.Ct. 1083 (1987)	9
<i>Chemehuevi Indian Tribe v. California State Board of Equalization</i> , 492 F.Supp. 55 (N.D. Cal. 1979)	14
<i>Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission</i> , 888 F.2d 1303, 14 Fed. R. Serv. 3d 1491 (10th Cir. 1989).....	5, 10, 11
<i>Confederated Tribes of Colville v. State of Washington</i> , 446 F.Supp. 1339 (E.D. Wash. 1978)	12
<i>Delaware Tribal Business Committee v. Weeks</i> , 430 U.S. 73 (1977)	15
<i>Fisher v. District Court</i> , 424 U.S. 382 (1976)	16
<i>Jicarilla Apache Tribe v. Andrus</i> , 687 F.2d 1324 (10th Cir. 1982)	12
<i>Martinez v. Southern Ute Tribe of Southern Ute Reservation</i> , 249 F.2d 915 (10th Cir. 1957).....	2
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	15
<i>McClanahan v. State Tax Commission of Arizona</i> , 411 U.S. 164, 93 S.Ct. 1257 (1973)	10, 14, 15
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973) ..	1, 10

TABLE OF AUTHORITIES - Continued

	Page
<i>Miree v. DeKalb County, Ga.</i> , 433 U.S. 25 (1977)	11
<i>Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation</i> , 425 U.S. 463, 96 S.Ct. 1634 (1976)	10, 14
<i>Oklahoma Tax Commission v. United States</i> , 319 U.S. 598 (1943)	14
<i>Organized Village of Kake v. Egan</i> , 369 U.S. 60 (1962)	14
<i>People of South Naknek v. Bristol Bay Borough</i> , 466 F.Supp. 870 (D. Alaska 1979)	15
<i>Puyallup Tribe, Inc. v. Dept. of Game of State of Washington</i> , 433 U.S. 165 (1977)	12
<i>Rice v. Olson</i> , 324 U.S. 786 (1945)	15
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	14
<i>Rice v. Sioux City Memorial Park Cemetery</i> , 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955)	5
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978) ...	12, 13
<i>Seneca-Cayuga Tribe of Oklahoma v. Oklahoma</i> , 13 Indian L. Rptr. 3103, Nos. 85-C-639-B and 86-C-393-B (N.D. Okl. June 5, 1986)	11
<i>Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma, ex rel. Thompson</i> , 874 F.2d 709 (10th Cir. 1989)	8
<i>State ex rel. May v. Seneca-Cayuga Tribe</i> , 711 P.2d 77 (Okl. 1985)	8, 10
<i>State v. Little Chief</i> , 573 P.2d 263 (Okl. Cr. 1978)	2
<i>U.S. v. Agnew</i> , 423 F.2d 513 (9th Cir. 1970)	12
<i>U.S. v. Barquin</i> , 799 F.2d 619 (10th Cir. 1986)	15

TABLE OF AUTHORITIES - Continued

	Page
<i>U.S. v. John</i> , 437 U.S. 634 (1978)	16
<i>U.S. v. U.S. Fidelity & Guaranty Co.</i> , 309 U.S. 506 (1940)	12
<i>U.S. v. Wheeler</i> , 435 U.S. 313 (1978)	15
<i>Ward v. Race Horse</i> , 163 U.S. 504 (1896)	14
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	7, 8, 9
<i>White Mountain Apache Tribe v. Industrial Commission of Arizona</i> , 696 P.2d 223 (Ariz. 1985)	16
CONSTITUTION AND STATUTES:	
"Oklahoma Enabling Act", Act of June 16, 1906, ch. 33-35, §§ 1-22, 34 Stat. 267-78	2
"Oklahoma Organic Act", Act of May 2, 1890, ch. 182, §§ 1-44, 26 Stat. 81-100	2
25 U.S.C. § 450 et seq.	1
25 U.S.C. § 465	1
25 U.S.C. § 503	1
25 U.S.C. § 1451 et seq.	1
Art. 3, "February 27, 1867 Treaty", 15 Stat. 531 (1868)	1
OKLA. CONST., art. I, § 3 (1981)	2
OKLA. STAT. tit. 51, § 152.1 (1989 Supp.)	16
OKLA. STAT. tit. 68, § 221 (1981)	6
OKLA. STAT. tit. 74, § 1221 (1989 Supp.)	1

TABLE OF AUTHORITIES - Continued

	Page
OTHER:	
47 Fed. Reg. 10,643, §§ 1-10 (1982).....	2
50 Fed. Reg. 6055 (1985).....	1
82 Op. of Atty. Gen. of Okla., No. 22 (1982)	16
F. Cohen, Handbook of Federal Indian Law, p. 405 (1982 ed.)	15
Fed. R. Civ. P. 13.....	12
Rev. Rul. 67-284, 1967-2, C.B. 55, 58; Memo. Sol. Int., May 1, 1941, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relat- ing to Indian Affairs 1917-1974, at 1044 (Wash- ington: Government Printing Office, n.d.)	9
Sup. Ct. R. 17.1	5

COUNTER-STATEMENT OF THE CASE

The Oklahoma Tax Commission ("Oklahoma") is the petitioner.¹ The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") is the respondent.

The Potawatomis are a federally-recognized Indian tribe² that adopted a Constitution under the Oklahoma Indian Welfare Act. *See* 25 U.S.C. §503; 50 Fed. Reg. 6055 (1985). Consistent with Congressional intent,³ the Potawatomis engage in various enterprises in an attempt to become self-sufficient. One of these enterprises is a convenience store known as the "Potawatomi Tribal Store" (also known as "Gallery Trading Post") which the Potawatomis wholly own and operate. The tribal store was constructed with federal funds and is located on lands within the Potawatomis' original reservation⁴ boundaries which are held in trust by the United States government and are "exempt from state and local taxation". 25 U.S.C. §465; *see also* 25 U.S.C. §503. Under treaty rights, the Potawatomis were promised that their lands "shall never be included within the jurisdiction of any state". Art. 3,

¹ In the proceedings below, the parties included the Oklahoma Tax Commission and individual members of the Tax Commission.

² "The State of Oklahoma acknowledges federal recognition of Indian tribes recognized by the Department of the Interior." OKLA. STAT. tit. 74, §1221 (1989 Supp.).

³ *See e.g. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); 25 U.S.C. §450 et seq. and §1451 et seq.

⁴ Oklahoma's references to "off-reservation" activity [*see e.g. Petition, supra pp. 8-9*] are irrelevant. All cigarette sales here were clearly within Indian Country.

"February 27, 1867 Treaty", 15 Stat. 531 (1868). These promises are reflected in Oklahoma's Organic and Enabling Acts and Constitution. As noted in *Martinez v. Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915, 917 (10th Cir. 1957), Oklahoma specifically recognized the exclusivity of federal jurisdiction over Indian lands in its Constitution. See "Oklahoma Organic Act", Act of May 2, 1890, ch. 182, §§1-44, 26 Stat. 81-100 ("[N]othing in this act contained shall be so construed as to give jurisdiction to the courts established in said territory." *Id.* at §12); "Oklahoma Enabling Act", Act of June 16, 1906, ch. 33-35, §§1-22, 34 Stat. 267-78 ("[N]othing contained in the said Constitution [of Oklahoma] shall be construed to limit or impair the right of persons or property pertaining to the Indians of said territory." *Id.* at §1). The Enabling Act prohibition was recognized in the Constitution subsequently adopted by Oklahoma. See OKLA. CONST., art. I, §3 (1981). "Article I, §3 of the Oklahoma Constitution constitutes a legal impediment" to the exercise of state court jurisdiction in Indian Country. *State v. Little Chief*, 573 P.2d 263, 265 (Okla. Cr. 1978); see also *C.M.G. v. State*, 594 P.2d 798, 799 (Okla. 1979).

The Potawatomis have enacted a cigarette tax ordinance which has been approved by the federal government and been published in the Federal Register. 47 Fed. Reg. 10,643, §§1-10 (1982). See Appendix A-7 to A-24. Since on or about August of 1982, the Potawatomis have sold cigarettes at the tribal store. Before being sold, the cigarettes are affixed with the Potawatomis' own tax stamp. The proceeds of the Potawatomi cigarette tax and the profits generated by the tribal store finance tribal operations.

The Potawatomis have never purchased, nor has Oklahoma ever attempted to require the Potawatomis to purchase, a state license to sell cigarettes. Oklahoma never attempted to license or assess the Potawatomis with any tax prior to February 12, 1987, and specifically recognized that sales to tribes were exempt from sales taxes under a governmental exemption (Appendix E-1).⁵

When Oklahoma served the Potawatomi Tribal Chairman with a \$2.7 million proposed cigarette tax assessment (see Appendix A-25), the Potawatomis promptly filed a complaint in the United States District Court for the Western District of Oklahoma seeking to enjoin this assessment. The Potawatomis submitted to the district court's jurisdiction "for the sole and limited purpose of securing equitable relief". See Appendix A-2, ¶1. The Potawatomis also filed a motion for preliminary injunction pending the trial court's ruling on the merits.

In a response filed the day of the hearing on the Potawatomis' motion for temporary injunction, Oklahoma represented that it intended to revoke the assessment against the Potawatomi's Chairman and to re-issue the same assessment against the Tribe. Based on that representation, the Potawatomis were substituted as the subject of the assessment. After the hearing, the Potawatomis' motion was granted and Oklahoma was temporarily enjoined from pursuing the proposed cigarette tax assessment against the Potawatomis.

⁵ Thus, Oklahoma is engaging in hyperbole in arguing that the Tenth Circuit opinion has resulted in "restructuring Oklahoma's taxing system by decree". Petition, supra p. 14.

Thereafter, Oklahoma answered and counterclaimed seeking declaratory relief and damages. See Appendix B-1. In its counterclaim, Oklahoma asked the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma has jurisdiction to tax Potawatomi sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted. See Appendix B-6. The Potawatomis' motion to dismiss this counterclaim was denied. See Appendix C-1.

The matter was submitted to the Court upon stipulated facts and briefs. Thereafter, the district court granted the Potawatomis' prayer for a permanent injunction⁶ and prohibited Oklahoma from assessing the Potawatomis with a state sales tax; however, the district court also granted, in part, Oklahoma's counterclaim. See *Petition, supra p. Appendix A-9*. Both parties appealed to the Tenth Circuit.

The Tenth Circuit found that the District Court erred in denying the Potawatomis' motion to dismiss Oklahoma's counterclaim and reversed and remanded the case

⁶ Oklahoma was "permanently enjoined from collecting any state sales taxes against and/or collecting any state sales taxes from" the Potawatomis. See *Petition, supra Appendix A-10*. Thus, Oklahoma overstated when - in its statement of the case - it represented that the District Court "imposed a broad injunction upon the State from assessing or collecting taxes from the Tribe or enforcing any tax law against the Tribe . . ." *Petition, supra p. 5* (emphasis added).

with instructions to dismiss the counterclaim. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303, 74 Fed. R. Serv. 3d 1491 (10th Cir. 1989).

Thereafter, the Potawatomis moved the District Court to enter an injunction consistent with the mandate. Oklahoma did not oppose this motion and a permanent injunction was entered. See Appendix D-1.

Oklahoma has now brought this petition for certiorari.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari is granted "only when there are special and important reasons therefor". *Sup. Ct. R. 17.1*. See also *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Because Oklahoma has not articulated any "special and important reason" for granting certiorari, the petition should be denied.

This suit is simple and straightforward. Oklahoma attempted to assess an Indian tribe for \$2.7 million in cigarette taxes. Contending that this proposed assessment was unlawful, the Indian tribe brought suit for injunctive relief. Oklahoma has yet to cite to the District Court, the Tenth Circuit or this Court a single authority for the proposition that it can assess an Indian tribe with a tax, nor has Oklahoma ever offered any support for its position that it has jurisdictional authority to proceed in

federal court against an Indian tribe with a counterclaim for a declaratory judgment.

In moving against the Potawatomis, Oklahoma served a proposed \$2.7 million assessment on John Barrett, Jr. – who was then and is now the Potawatomi Business Committee Chairman. The proposed assessment was for allegedly selling cigarettes at the tribal store in December of 1982 through December of 1986 without remitting state cigarette taxes. As Oklahoma well knew, Barrett's only connection with the tribal store during this period was as the Potawatomis' Business Committee Chairman or as Tribal Administrator or as an enrolled member of the Tribe. Under state law, Barrett had 30 days to file a protest of Oklahoma's proposed assessment. *OKLA. STAT. tit. 68, §221(c) (1981)*. Absent the filing of a timely protest, he would have been personally liable for \$2.7 million in state cigarette taxes.

On appeal and now in the petition for certiorari, Oklahoma is not asserting any authority for the proposition that a state can assess taxes against Indian tribes. Instead, Oklahoma impugns the motives of the justices who wrote the opinion below [*Petition, supra p. 5*] and whines about the difficulties state governments encounter when Indian tribes exercise their rights. *Id.* at 18.

Oklahoma has cited no authority nor even attempted to argue that it could have independently pursued its action in federal court. Rather, Oklahoma is attempting to use its patently unlawful act in attempting to assess a tax against an Indian tribe as a way of acquiring jurisdiction to litigate Indian tribes out of existence.

Oklahoma has not articulated any conflict between the circuit courts of appeal concerning the issue of tribal sovereign suit immunity. It merely asks this Court to overturn 200 years of unbroken recognition of the right.

The purported decisional conflicts posited by Oklahoma are not germane. The Oklahoma Supreme Court opinion referenced by Oklahoma has been mooted by a decision of the U.S. District Court for the Northern District of Oklahoma. The Oklahoma Supreme Court case is not controlling in this litigation. In fact, it was not cited heretofore by Oklahoma in the Tenth Circuit and is not in any meaningful conflict with the decision in this case.

The U.S. Supreme Court case cited by Oklahoma⁷ was not a tax assessment case and arose in a state which had been specifically granted authority in Indian Country by Public Law 280.⁸ In any event, *Colville* has no relevance unless Oklahoma can pursue its counterclaim for a declaratory judgment. This pursuit is only possible if all case law concerning counterclaims against sovereigns is reversed. Oklahoma has not articulated any valid reason for such a reversal. In fact, clearly illegal behavior by the State would be condoned if Oklahoma is allowed to pursue its counterclaim. Oklahoma either can assess a tribe

⁷ *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

⁸ At page 9 of the Petition, Oklahoma argues "this Court never relied on P.L. 280 for its holding in *Colville*, nor even mentioned the law". On the contrary, Public Law 280 was cited by the State as authority for state jurisdiction in Indian Country. *Colville*, supra p. 142, n. 8. See also *id.* at 164, n. 32 ("The *Colville* Tribe consented in 1965 to the State's assumption of jurisdiction over it . . .").

and collect the tax or it cannot. If it can assess an Indian tribe, then Oklahoma does not need help from the federal court and the Potawatomis are not entitled to an injunction. On the other hand, if, as the district and appellate courts found, Oklahoma has no business assessing an Indian tribe with a cigarette tax, then Oklahoma cannot use a clearly illegal act to acquire jurisdiction for the purpose of litigating other issues. This would condone and reward illegal and improper state action. It would allow the bootstrapping of jurisdiction. States would be encouraged to bring all kinds of unlawful actions against Indian tribes solely for the purpose of getting sued so they could then pursue their own claims.

PROPOSITION I: THE TENTH CIRCUIT OPINION THAT OKLAHOMA MAY NOT ASSESS AN INDIAN TRIBE WITH A CIGARETTE TAX IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

In its first proposition, Oklahoma argues that the Tenth Circuit opinion was an "express rejection of the controlling authority of this Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980)" [Petition, *supra* p. 6] and in conflict "with the Supreme Court of Oklahoma's opinion in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985)" [Petition, *supra* p. 11] (hereafter *Seneca-Cayuga I*). Oklahoma is erecting irrelevant strawmen. First, *Colville* was merely cited by the Tenth Circuit in dicta – it was not dispositive in reversing the district court. Second, *Seneca-Cayuga I* was rejected by the United States Court of Appeals for the Tenth Circuit. See *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma, ex rel.*

Thompson, 874 F.2d 709 (10th Cir. 1989) (hereafter *Seneca-Cayuga II*).

a. *Washington v. Confederated Tribes of Colville*.

In relying on the *Colville* case, Oklahoma has placed the cart before the horse. Here, Oklahoma is attempting to directly assess the Potawatomis with \$2.7 million in taxes.⁹ *Colville* is not authority for the proposition that states can assess Indian tribes with a tax. In fact, *Colville* and related cases¹⁰ were decided adversely to the tribes only because the "legal incidence of the tax" did not fall on the Tribe. *Colville, supra* p. 142, n. 9. State taxation of Indian tribes¹¹ for activities in Indian Country has consistently been rejected. See e.g. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17, 107 S.Ct. 1083, n. 17 (1987); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373,

⁹ It is often said that the power to tax is the power to destroy. Unlike the tax collection cases, here the threat of destruction from an asserted taxing power is not hypothetical, but rather immediate. The Potawatomis would be destroyed as a tribe if forced to pay Oklahoma \$2.7 million.

¹⁰ *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 12, 106 S.Ct. 289, 290 (1985) (injunction against collecting state tax reversed because legal incidence of tax "falls on the non-Indian consumers of cigarettes"); *Moe, infra* p. 483 (1976) ("Since this burden [collecting state sales taxes] is not, strictly speaking, a tax at all . . .").

¹¹ Indian tribes are not taxable entities under the Internal Revenue Code. Rev. Rul. 67-284, 1967-2, C.B. 55, 58; Memo. Sol. Int., May 1, 1941, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1044 (Washington: Government Printing Office, n.d.).

376-77, 96 S.Ct. 2102, 2105-06 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-82, 96 S.Ct. 1634, 1644-46 (1976); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-81, 93 S.Ct. 1257, 1266-67 (1973); *Mescalero Apache Tribe v. Jones*, supra p. 148.

Because *Colville* is not authority for state taxation of Indian tribes, its relevance arises only if Oklahoma can pursue a counterclaim which, as argued hereinafter, would violate the doctrine of sovereign suit immunity. The Tenth Circuit held that Oklahoma could not pursue its counterclaim against the Potawatomis and ordered the counterclaim dismissed. Thus, the only subsequent issue addressed by the Tenth Circuit was whether Oklahoma had authority to assess the Potawatomis with a \$2.7 million tax. The Tenth Circuit found Oklahoma had no such authority and that Oklahoma's reliance on *Colville* was misplaced. *Id.* at 1306-7.

In any event, for the reasons expressed by the Tenth Circuit, the *Colville* case is distinguishable and not applicable to the action herein. See *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d at 1307. Oklahoma failed to establish an independent jurisdictional grant of authority over Indian tribes which was present in *Colville*. Therefore, contrary to Oklahoma's argument, the Tenth Circuit did not expressly "reject" *Colville*, but rather distinguished it in dicta. *Id.* at 1307.

b. State ex rel. May v. Seneca-Cayuga Tribe.

In citing the *Seneca-Cayuga I* opinion, Oklahoma failed to notify the Court that this opinion was essentially

nullified when the U.S. District Court for the Northern District of Oklahoma¹² enjoined a state trial court from proceeding consistent with *Seneca-Cayuga I*. The federal injunction was affirmed on appeal. *Seneca-Cayuga II*, supra p. 717. No conflict exists between the Oklahoma Supreme Court's *Seneca-Cayuga I* opinion and the Tenth Circuit opinion here. The state/federal conflict, if any, is between *Seneca-Cayuga I* and *Seneca-Cayuga II*. Resolution of this alleged conflict should be pursued through a petition for certiorari from *Seneca-Cayuga II*, not by review of this case. Although the Potawatomis mentioned *Seneca-Cayuga I* in their Tenth Circuit brief,¹³ Oklahoma did not cite *Seneca-Cayuga I* or argue about an alleged conflict until filing its petition for certiorari. See *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 34 (1977) (on review by certiorari, Supreme Court "will not consider" issue which is "neither pleaded, argued nor briefed either in the District Court or in the Court of Appeals").

Oklahoma has failed to present a conflict in the lower courts which would merit review by this Court.

PROPOSITION II: THE DECISION BELOW APPLIED THE DOCTRINE OF SOVEREIGN IMMUNITY CONSISTENT WITH ALL PAST CASES.

It has long been recognized that Indian tribes enjoy sovereign immunity from unconsented suit, subject to

¹² *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 13 Indian L. Rptr. 3103, Nos. 85-C-639-B and 86-C-393-B (N.D. Okl. June 5, 1986). As a party to this suit, Oklahoma, of course, is well aware of it.

¹³ See *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, No. 88-2160 (10th Cir. 1989), Brief of Appellant, pp. 25, 28 (Aug. 31, 1988).

plenary control of Congress. See *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 173 (1977). The standard articulated by the Supreme Court for finding a Congressional waiver of tribal sovereign immunity is that there be an "unequivocal expression of . . . legislative intent". *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978). An Indian tribe does not consent to suit on a counterclaim merely by filing as a plaintiff. *U.S. Fidelity & Guaranty Co.*, *supra* p. 513. "[T]ribal [suit] immunity . . . is generally coextensive with that of the United States." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982); cf. *Fed. R. Civ. P.* 13(d).

Although a counterclaim may be asserted against a sovereign by way of set-off or recoupment to defeat or diminish the sovereign's recovery, **no affirmative relief** may be given against a sovereign in the absence of consent.

U.S. v. Agnew, 423 F.2d 513, 514 (9th Cir. 1970) (emphasis added). See also *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339, 1351 (E.D. Wash. 1978) ("Since the Tribes have not consented to suit, this Court has no jurisdiction to entertain the State's claim for declaratory relief"), *reversed on other grounds*, 447 U.S. 134 (1980). The Potawatomis did not consent to the jurisdiction necessary to litigate Oklahoma's counterclaim, and the Tenth Circuit was correct in reversing the district court and remanding with instructions to dismiss the counterclaim.

Oklahoma argues that the sovereign suit immunity doctrine makes it very difficult for Oklahoma to collect taxes from another sovereign. *Petition, supra* p. 18. This is

not a new or novel situation but one which has always attended the sovereign suit immunity doctrine. Cf. *Santa Clara Pueblo, supra* p. 70. Oklahoma concludes that the "result being that even though the State does have the right to have its **valid** taxes collected, the State cannot enforce its right against the Tribe under the Tenth Circuit sovereign immunity theory." *Petition, supra* p. 12 (emphasis added). Again, Oklahoma is making assumptions for which it has yet to provide any authority, to-wit: that its tax assessment against an Indian tribe is valid.¹⁴

Oklahoma argues that "this Court has abrogated the doctrine of sovereign immunity for Indian tribes in the area of state taxation in order to accommodate the legitimate and compelling interest of the state to collect its valid taxes." *Petition, supra* p. 5. This bold statement is not immediately followed with any citation of authority.¹⁵

¹⁴ Oklahoma continually misstates the Tenth Circuit decision upholding the Tribe's suit immunity and tax immunity. For example, Oklahoma argues, "The Tenth Circuit's opinion recognizes that **the Tribe maintains unqualified sovereignty over the State** which is co-extensive with that of the United States." *Petition, supra* p. 12. Similar arguments are made throughout the petition. See e.g. *Id.* at 16 ("These decisions do not provide that an Indian Tribe enjoys absolute and unqualified sovereignty over the government of the State of Oklahoma."). These arguments are non-sequiturs. The Potawatomis are not asserting any sovereignty over Oklahoma, but merely protecting their own.

¹⁵ The lack of citation to authority is not surprising. This Court has historically recognized that only Congress - and not this Court - may abrogate tribal sovereign immunity. See e.g. *Santa Clara Pueblo, supra* p. 59.

The later citations on page 17 of the petition are not tribal suit immunity cases. They are suits involving individual Indians¹⁶ or cases where Indian tribes were involved in activities outside Indian Country where the issue of suit immunity was not litigated¹⁷ or cases where Indian tribes in P.L. 280 states were required prospectively to collect state taxes.¹⁸ The *Moe* and *Colville* cases did not authorize a state to assess taxes against an Indian tribe.

Oklahoma argues that there "is no authority to allow a Tribe to operate a business **within this state** and without complying with state law". *Petition, supra* p. 17 (emphasis added). The business being operated by the Potawatomis is not "within this state". The Potawatomis are conducting business on land within their original reservation boundaries held in trust by the United States

¹⁶ *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) (portion of Indian probate estate - fee land, cash and securities - not exempt from state estate tax but transfer of restricted Indian lands are not subject to tax); *Ward v. Race Horse*, 163 U.S. 504 (1896) (off-reservation hunting and fishing by Indian); *Rice v. Rehner*, 463 U.S. 713 (1983) (person licensed under the Federal Traders License Act); *McClanahan, supra* (federal injunction of state taxation of Indian's reservation income and property upheld).

¹⁷ *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (off-reservation fishing); *Mescalero, supra* p. 146 (state taxation of ski resort outside of reservation boundaries upheld where tribe "duly protested the use tax assessment and sought a refund of the sales taxes paid"). "[S]overeign immunity from suit was not an issue in *Mescalero*; the Tribe had paid the gross receipts tax under protest and was seeking a refund." *Chemehuevi Indian Tribe v. California State Board of Equalization*, 492 F.Supp. 55, 60 (N.D. Cal. 1979).

¹⁸ *Moe, supra*; *Colville, supra*.

for the benefit of the Potawatomis, i.e. activity wholly within Indian Country. See *Mattz v. Arnett*, 412 U.S. 481, 506 (1973).

Oklahoma also argues that the Tenth Circuit opinion "has decided an important question of federal law in such a way that adversely affects the State's ability to tax **its citizens**". *Petition, supra* p. 18 (emphasis added). Again, Oklahoma provides no citation for the proposition that an **Indian tribe** is a citizen of a state. The extant case law is to the contrary.

'[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.' *Rice v. Olson*, 324 U.S. 786.

McClanahan, supra p. 168. Two consistent themes characterize Indian law. The first is that the federal government has plenary control over Indian tribes [*Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977)]; that is, Congress tomorrow could forever and finally terminate the sovereign status of Indian tribes. The second, a corollary to the first, is that absent an exercise of this plenary power, the Indian tribes retain all of their sovereign rights to the absolute exclusion of the state. *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978); *U.S. v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986).

[T]he jurisdictional presumption that exists in federal Indian law [is] that a state has no jurisdiction over Indians on a reservation unless it has been explicitly granted that jurisdiction.

People of South Naknek v. Bristol Bay Borough, 466 F.Supp. 870, 876 (D. Alaska 1979). This policy includes that the "scope of a state tax law may not encompass taxation of Indians or tribes". *F. Cohen, Handbook of Federal Indian Law*, p. 405 (1982 ed.). Among the reasons for this policy

is that Indian tribes are immune from suit and, absent federal statute, states have no jurisdiction in Indian Country. *U.S. v. John*, 437 U.S. 634 (1978); *Fisher v. District Court*, 424 U.S. 382 (1976).

Oklahoma argues that if "the State cannot sue the Tribe for taxes, it would follow that the Tribe would not be responsible to the State for workers compensation or unemployment compensation." See *Petition*, *supra* p. 18. As Oklahoma well knows, this purported future disastrous result has long been the reality in Oklahoma. For example, Oklahoma was recently sanctioned for bringing a frivolous suit in an effort to compel an Indian tribe to participate in the state unemployment fund. See *State of Oklahoma v. The Choctaw Nation of Oklahoma*, No. CIV-88-595A (W.D. Okl. Jan. 4, 1989) (order granting sanctions). A copy is at Appendix F-1. Indian tribes are not subject to Oklahoma's workers compensation law. See 82 *Op. of Atty. Gen. of Okla.*, No. 22 (1982). A copy is at Appendix G-1. See also *White Mountain Apache Tribe v. Industrial Commission of Arizona*, 696 P.2d 223 (Ariz. 1985).

Oklahoma says the Potawatomis may not be liable for damages incurred in tribal businesses or other businesses with which the Potawatomis deal. This is the very nature of sovereign immunity. For example, Oklahoma is immune from tort actions unless it waives immunity. See e.g. *OKLA. STAT. tit. 51, §152.1* (1989 *Supp.*) ("The State of Oklahoma hereby adopts the doctrine of sovereign immunity.").

The decision of the Tenth Circuit Court of Appeals that the doctrine of sovereign suit immunity bars a counterclaim which has no independent jurisdictional basis is

consistent with extant law. Oklahoma has cited no compelling reason for changing these laws.

CONCLUSION

The petition for writ of certiorari does not present any special or important reason for this Court to review the opinion of the Tenth Circuit and, accordingly, should be denied.

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INDEX TO APPENDIX

Page

APPENDIX ITEM

A	Complaint.....	A-1
B	Answer and Counter-Claim.....	B-1
C	Order denying motion to dismiss counterclaim....	C-1
D	Permanent injunction.....	D-1
E	OTC letter to Potawatomis.....	E-1
F	<i>State of Oklahoma v. Choctaw Nation of Oklahoma</i> , No. CIV-88-595-A (W.D. Okl. Jan. 4, 1989) (order).....	F-1
G	82 Op. of Atty. Gen. of Okla. No. 22.....	G-1

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND
POTAWATOMI INDIAN
TRIBE OF OKLAHOMA,

CIV-87-0338 W

Plaintiff,

No. ____

v.

THE OKLAHOMA TAX
COMMISSION; CINDY
RAMBO, CHAIRMAN OF
THE TAX COMMISSION;
ROBERT L. WADLEY,
VICE-CHAIRMAN OF
THE TAX COMMISSION;
AND DON KILPATRICK,
SECRETARY OF THE TAX
COMMISSION,

Defendants.

COMPLAINT
(ACTION FOR INJUNCTIVE RELIEF)
(Filed Feb. 18, 1987)

Consistent with federal, constitutional and statutory law, plaintiff, an Indian tribe, brings this action to enjoin defendants from unlawfully interfering with plaintiff's right to make its own laws and be ruled by them in Indian Country.

I.

Jurisdiction and Venue

1. This is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior wherein the matter in controversy arises under federal law. Thus, this Court has original jurisdiction under the provisions of 28 U.S.C. §1362. Plaintiff's cause of action arises under the Constitution and laws of the United States, including: "Oklahoma Organic Act", (Act of May 2, 1890, ch. 182, §§1-44, 26 Stat. 81-100); "Oklahoma Enabling Act" (Act of June 16, 1906, ch. 3335, §§1-22, 34 Stat. 267-278); 25 U.S.C. §§501 *et seq.*; U.S. CONST. art. I, §8, cl. 3; art. IV, §3 cl. 2; art. VI, cl. 2; and amend. XIV, §1. Plaintiff submits to this Court's jurisdiction for the limited and sole purpose of securing the equitable relief prayed for herein.

2. Venue properly lies in this district under 28 U.S.C. §1391 as the acts of defendants of which plaintiff complains occurred wholly within this district and defendants reside within this district and within the State of Oklahoma. Plaintiff is situated within this district.

PARTIES

3. Plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma, is, and at all times hereinafter mentioned was, a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and duly recognized as an Indian tribe by the Secretary of the Interior. *See e.g.* 50 Fed. Reg. 6055 (1985). Plaintiff's tribal headquarters is located in Indian Country within Pottawatomie County, State of Oklahoma.

4. Defendants are the Oklahoma Tax Commission and its three appointed members. Defendant Oklahoma Tax Commission is located in Oklahoma County, State of Oklahoma, and the acts of its officers, agents, employees or others acting in concert have and will take place within the Western District of the State of Oklahoma.

GENERAL ALLEGATIONS

5. Consistent with federal law, the State of Oklahoma entered the union disclaiming any jurisdiction over Indian lands.

6. Pursuant to 25 U.S.C. §503, plaintiff adopted a Constitution establishing a tribal government which was approved by the Secretary of the Interior on October 17, 1938, and ratified by the tribal members on December 12, 1938. This Constitution, as amended, provides that plaintiff is a sovereign to be governed by a Business Committee periodically elected by tribal members.

7. Under the plaintiff's Constitution, the Business Committee is a five-member body with the "power to transact business and otherwise speak or act on behalf of the tribe in all matters on which the tribe is empowered to act now or in the future". John Barrett, Jr. was elected to a two-year term as Chairman of the plaintiff's business committee on June 29, 1985.

8. Plaintiff owns and operates a convenience store called Potawatomi Tribal Store (a/k/a "The Gallery Trading Post") wholly located on tribal trust lands and constructed by the tribe with federal funds secured through a federal community action block grant program.

9. Under Oklahoma law, defendants enforce state taxing laws including the state cigarette tax which requires those individuals selling cigarettes in the State of Oklahoma, to be licensed and to purchase and affix state tax stamps before selling the cigarettes.

10. Plaintiff has never purchased, nor has the State of Oklahoma ever attempted to require plaintiff to purchase, a license to sell cigarettes.

11. Defendants have never assessed and plaintiff has never collected a state tax on the sale of cigarettes on tribal land.

12. Plaintiff licenses the sale and imposes a tribal tax on cigarettes sold on tribal trust land. All cigarettes sold by plaintiff are in packages bearing the tribal tax stamp.

13. Plaintiff's cigarette tax ordinances have been approved by the federal government. A true and correct copy of plaintiff's ordinance imposing the licensing and taxes on cigarette sales is attached hereto as Exhibit "A".

14. The proceeds of the tribal tax are placed in the tribal general fund and represent 5% to 10% of the monies which finance plaintiff's operations.

15. The profits from the sale of cigarettes on tribal land flow through plaintiff's general fund and are used to help plaintiff become a self-sufficient sovereign consistent with the intent of Congress.

16. On or about February 3, 1987, defendants notified John Barrett "d/b/a Gallery Trading Post" that he had been assessed \$2,691,470.70 for failing to remit the cigarette taxes allegedly due upon the sale of cigarettes

from plaintiff's store from December 1, 1982, through September 30, 1986. A true and correct copy of this assessment letter is Exhibit "B" hereto.

17. Under Oklahoma Statutes, Barrett has thirty (30) days or until March 4, 1987, to file written notice of protest of this purported tax assessment.

18. Defendants assert Barrett owes the taxes for the sale of cigarettes because he is doing business as the "Gallery Trading Post".

19. Other than being Chairman of plaintiff's Business Committee since June of 1985, Barrett has never had any connection with "The Gallery Trading Post".

20. Defendants know that Barrett does not do business as "The Gallery Trading Post" and are merely proceeding against plaintiff's officer to harrass plaintiff. Defendants' actions are a violation of Barrett's civil rights and are a direct affront to the sovereignty of plaintiff in violation of federal law.

21. As a federally-recognized sovereignty, plaintiff has the right to conduct business on its own land free from state interference and free to make its own laws and be ruled by them.

22. Plaintiff is immune from state taxation as are its officers and employees acting within the scope of their authority.

23. Defendants' efforts to assess taxes against plaintiff's officers or employees arising from sales made at plaintiff's store unlawfully interfere with plaintiff's right as an Indian tribe to govern activities which take place on its land.

24. Defendants' assessment of taxes under Oklahoma law against plaintiff's officer is an unlawful attempt to evade plaintiff's immunity from state taxation. Defendants' method of assessing plaintiff's officers and employees with the tax is a direct infringement upon plaintiff's right of self-government.

25. Contrary to the law and facts, defendants are attempting to assess a cigarette tax for sales at the plaintiff's tribal store against an individual, not plaintiff, as evidenced by the assessment letter to "John A. Barrett, d/b/a Gallery Trading Post". Defendants are attempting to do indirectly (assess plaintiff's officer) something it cannot do directly (assess plaintiff).

26. Unless defendants are enjoined from coming on plaintiff's land and from assessing plaintiff or its officers and employees, plaintiff will sustain substantial and irreparable injury to its right to self-government, including, *inter alia*, to the plaintiff's ability to get qualified people to serve as its officers and employees.

27. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this Court enter a judgment that:

1. Preliminarily enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees;

2. Permanently enjoins defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or participation with them from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff, plaintiff's officers, agents or employees;

3. Assesses defendants with plaintiff's costs herein including reasonable attorneys fees; and

4. Provides such further necessary and proper relief as may be just.

DATED: February 18, 1987.

PIERSON, BALL & DOWD

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ATTORNEYS FOR PLAINTIFF

EXHIBIT A

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Citizen Band of Potawatomi Indians of Oklahoma; Ordinance Regulating the Sale and Use of Liquor and Tobacco Products

February 19, 1982

This Notice is published in accordance with authority delegated by the Secretary of the Interior to the Assistant Secretary - Indian Affairs by 209 DM 8 and in accordance with the Act of August 15, 1953 67 Stat. 586 18 U.S.C. 1161 (1976). I certify that the following Resolution and Ordinance relating to the application of the Federal Indian tobacco and liquor laws on the tribal trust lands of the Citizen Band of Potawatomi Indians of Oklahoma were adopted on February 2, 1981, by the Citizen Band of Potawatomi Indians of Oklahoma Business Committee which has jurisdiction over the area of Indian country defined in the Ordinance reading as follows:

Kenneth Smith,

Assistant Secretary - Indian Affairs

Citizen Band Potawatomi Indians of Oklahoma

Shawnee Oklahoma

February 2, 1981

Resolution 81-19

A Resolution establishing the Citizen Band of Potawatomi Indians of Oklahoma ordinance regulating the distribution and sale of tobacco products and/or liquor and beer products.

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee as the governing body of the Citizen Band Potawatomi Indians of Oklahoma is charged by the Tribal Constitution and By-laws to transact business and other wise speak or act on behalf of the

Tribe in all matters on which the Tribe is empowered to act; and

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee has the responsibility of protecting the health, security, and general welfare of the Tribe and its members; and

Whereas, the State of Oklahoma is without jurisdiction on (t)ribal trust lands of the Citizen Band Potawatomi Indians of Oklahoma to regulate and control Indian smoke shops, liquor outlets, or other outlets operated by the Tribe or by tribal members; and

Whereas, the Citizen Band Potawatomi Indians of Oklahoma Business Committee deems it essential to the health, security, and general welfare of the Citizen Band Potawatomi Indians of Oklahoma and its members to enact a comprehensive tobacco and liquor ordinance relating to the sale and distribution of cigarettes, other tobacco products and liquor products and levying an excise tax upon such sale and distribution on the Tribal Trust Lands of the Citizen Band Potawatomi Indians of Oklahoma: NOW.

Therefore, be it resolved: The Citizen Band Potawatomi Indians of Oklahoma does hereby promulgate the attached ordinance entitled "The Citizen Band Potawatomi Indians of Oklahoma Tobacco and Liquor Regulations."

Certification

We, Wanita R. Clifford, Tribal Chairperson and Christine Gifford, Secretary-Treasurer, of the Citizen Band

Potawatomi Indians of Oklahoma do hereby certify that the above resolution POTT = 81-19 is a true and exact copy as approved by the Business Committee, with 3 voting for, 0 opposed 1 abstention.

Wanita R. Clifford.

Acting Tribal Chairperson.

Mary Lynn Hilimeyer.

Acting Tribal Chairperson, Secretary, Treasurer.

The Citizen Band Potawatomi Indians of Oklahoma
Tobacco and Liquor Regulations

1-1 Title and Purpose.

1-1.01 This document shall be known as the Citizen Band Potawatomi Indians of Oklahoma Tobacco and Liquor Regulations. These regulations are enacted to regulate the sale and distribution of tobacco products and/or liquor and beer products on Tribal Trust Lands of the Citizen Band Potawatomi Indians of Oklahoma, and to generate revenue to fund needed tribal programs and services.

1-2 Definitions.

1-2.01 Unless otherwise required by the context the following words and phrases shall have the designated meanings:

(1) "Tribe" shall mean the Citizen Band Potawatomi Indians of Oklahoma. Route 5, Box 151, Shawnee, OK 74801.

(2) "Business Committee" shall mean the Citizen Band Potawatomi Indians of Oklahoma Business Committee as constituted by Article V of the Constitution and By-laws of the Citizen Band Potawatomi Indians of Oklahoma.

(3) "Tribal Trust Lands" shall mean the lands and waters lying within the boundaries of the property described below:

Tract Numbered 1

The northeast quarter northeast quarter, southeast quarter northeast quarter, southwest quarter northeast quarter section 31, township 10 north, range 4 east. Indian meridian. Pottawatomie County, Oklahoma, containing 120.00 acres, more or less.

Tract Numbered 2

That part of the northwest quarter southeast quarter section 31, township 10 north, range 4 east. Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the southwest corner of said northwest quarter southeast quarter; thence east 1,320 feet; thence north 1,320 feet; thence west 1,320 feet to the center of said section; thence south 167 feet; thence east 183 to the intersection with the west line of the Atchison, Topeka, and Santa Fe Railroad right-of-way; thence southwesterly along the west right-of-way line a distance of 856 feet to the intersection with a point in the west line of northwest quarter southeast quarter, said point being 983 feet south of the center of section 31; thence south along the west

line of the northwest quarter southeast quarter, a distance of 337 feet, to the point of beginning; containing 38.29 acres, more or less.

Tract Numbered 3

That part of the southeast quarter northwest quarter section 31, township 10 north, range 4 east, Indian meridian. Pottawatomie County, Oklahoma, described as: Beginning at the northeast corner of said southeast quarter northwest quarter; thence south 1,320 feet to the center of said section 31; thence west along the south line of said southeast quarter northwest quarter a distance of 1,255.4 feet to the intersection with the centerline of Oklahoma State Highway Numbered 18; thence northwesterly along the centerline of the highway a distance of 660.58 feet to a point on the south line of the northwest quarter southeast quarter northwest quarter; thence east 38 feet to the intersection with the east right-of-way line of Oklahoma State Highway Numbered 18; thence northwesterly along the east right-of-way line to a point in the north line of said southeast quarter northwest quarter said point being 58 feet east of the northwest corner of said southeast quarter northwest quarter, thence east a distance of 1,262 feet to the point of beginning containing 38.83 acres more or less.

Tract Numbered 4.

That part of the northeast quarter southwest quarter section 31 township 10 north, range 4 east Indian meridian Pottawatomie County, Oklahoma described as: Beginning at the northeast corner of said northeast quarter

southwest quarter, said point being the center of section 31 thence south 167 feet; thence west 1,302 feet to the intersection with the west line of the right-of-way of Oklahoma State Highway Numbered 18 thence northeasterly along the west right-of-way line a distance of 167 feet to the north line of said northeast quarter southeast quarter thence east along said north line a distance of 1,297.4 feet to the point of beginning containing 4,678 acres, more or less.

Tract Numbered 5.

That part of the northeast quarter southwest quarter section 31 township 10 north range 4 east Indian meridian Pottawatomie County, Oklahoma described as: Beginning at the southeast corner of said northeast quarter southwest quarter; thence north along the east line of said northeast quarter southwest quarter a distance of 337 feet to the intersection with the west right-of-way line of the Atchison Topeka and Santa Fe Railroad right-of-way thence southwesterly along said west right-of-way line a distance of 367 feet to the intersection with the south line of said northeast quarter southwest quarter thence east along the south line a distance of 129 feet to the point of beginning containing 498 acre more or less.

Tract Numbered 7.

That part of lot 1 (northwest quarter of northwest quarter) and north half of lot 2 (north half of southwest quarter of northwest quarter) and the part of the north half of the southeast quarter of the northwest quarter lying west of the east right-of-way line of Oklahoma State

Highway Numbered 18, all in section 31 township 10 north range 4 east Indian meridian. Pottawatomie County, Oklahoma containing 57.99 acres more or less subject to the right of the Absentee Shawnee Tribe of Indians of Oklahoma the Sac and Fox Tribe of Indians of Oklahoma the Kickapoo Tribe of Indians of Oklahoma and the Iowa Tribe of Indians of Oklahoma to use the Pottawatomie community house that may be constructed and maintained thereon.

[4] "Member" shall mean any person whose name appears on the official roll of the Citizen Band Potawatomi Indians of Oklahoma.

[5] "Commercial Sale" shall mean the transfer, exchange or barter in any or by any means whatsoever for a consideration by any person, association, partnership, or corporation of cigarettes tobacco products and/or liquor and beer products.

[6] "Wholesale Price" shall mean the established price for which cigarettes, tobacco products and/or liquor and beer products are sold to the Citizen Band Potawatomi Indians of Oklahoma or any licensed operator by the manufacturer or distributor exclusive of any discount or other reduction.

[7] "Tobacco Products" shall mean cigars, cheroots, stogies, granulated plug cut, crim cut, ready rubbed, and other smoking tobacco, snuff, cavendish, snuff flour, plug and twist tobacco, five cut and other chewing tobacco shorts and other kinds and forms of tobacco prepared in such a manner as to be suitable for chewing or smoking in a pipe or otherwise or both for smoking and chewing Tobacco products shall include cigarettes.

[8] "Cigarette" shall mean any roll for smoking made wholly or in part of tobacco being flavored adulterated or mixed with any other ingredient where such wrapper is wholly or in any part made of paper or any material except where such is wholly or in the greater part made of natural leaf tobacco in its natural state.

[9] "Tobacco Outlet" shall mean a tribally licensed retail sales business selling tobacco products on tribal trust lands of the Citizen Band Potawatomi Indians of Oklahoma

[10] "Alcohol" is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine which is produced by the fermentation or distillation of grain, starch molasses or sugar, or other substances including all dilutions and mixtures of this substance.

[11] "Beer" means any beverage obtained by the alcohol fermentation of an infusion or decoction of pure hops, or pure extract of hops, and malt and sugar in pure water containing not more than 6% of alcohol by weight.

[12] "Liquor Outlet" shall mean a tribally licensed retail sale business selling liquor or beer on tribal trust lands.

[13] "Operator" shall mean all enrolled members of twenty-one years of age and over of the Citizen Band Potawatomi Indians of Oklahoma or enrolled members of twenty-one years of age and over of another federally recognized Tribe of American Indians licensed by the Citizen Band Potawatomi Indians of Oklahoma to operate a tobacco and/or liquor and beer outlet.

1.3 Licensing of Tobacco or Liquor and Beer Outlets.

1-3.01 Licensing. The Citizen Band Potawatomi Indians of Oklahoma Business Committee shall be the Citizen Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission. The Commission is empowered to.

[1] Administer these regulations by exercising general control, management, and supervision of all tobacco and/or liquor and beer sales, places of sale and sales outlets as well as exercising all powers necessary to accomplish the purposes of these regulations.

[2] Adopt and enforce rules and regulations in furtherance of the purpose of these regulations and in the performance of its administrative functions.

1-4 Nature of Outlet.

1-4.01 Nature of Outlet Each tobacco and/or liquor and beer outlet, license granted by the Commission hereunder, shall be managed pursuant to a Federal Indian Trader's License provided in Section 1-7 hereof.

1-5 Application for Tobacco Outlet License or Liquor and Beer Outlet License.

1-5.01 Application. Any enrolled member, twenty-one years of age and older of the Citizen Band Potawatomi Indians of Oklahoma or an enrolled member, twenty-one years of age and older of a federally recognized Tribe may apply to the Commission for a tobacco outlet license and/or a liquor and beer outlet license.

1-5.02 Processing of Application. The Tribal Secretary Treasure shall receive and process applications and be the official representative of the Tribe and Commission in matters relating to tobacco and/or liquor and beer excise tax collections and related matters. The Commission or its authorized representative shall obtain additional information as deemed appropriate. If the Commission or its authorized representative is satisfied that the applicant is a suitable and respectable person, the Commission or its authorized representative may issue a license for the sale of tobacco products and/or liquor and beer products.

1-5.03 Application Fee. Each application shall be accompanied by an application charge or fee of twenty-five dollars (\$25.00) An application for both a tobacco outlet license and a liquor and beer outlet license shall be considered to be two applications with an application charge of twenth-five dollars (\$25.00) each.

1-6 Tobacco Outlet Licenses Liquor and Beer Licenses.

1-6.01 Upon approval of an application, the Commission shall issue the applicant a tobacco outlet license and/or a liquor and beer outlet license whichever the case may be, for one year from the date of issuance, which shall intitle the operator to establish and maintain only the type outlet being permitted. This license shall not be transferable. It shall be renewable at the discretion of the Commission by submission of the licensee of subsequent application form and payment of application fee as provided in Section 1-5.

1-7 Trader's License.

1-7.01 Trader's License. No tobacco outlet license or liquor and beer outlet license shall be issued to any operator unless he/she has obtained a Federal Indian Trader's License from the Superintendent of the Shawnee Agency. Bureau of Indian Affairs Revocation of the Federal Indian Trader's License shall be grounds for the revocation of their operator's tobacco outlet license and/or liquor and beer outlet license by the Commission.

1-8 Regarding Sales by Liquor Wholesales and transport of Liquors upon Tribal Trust Lands.

1-8.01 Right of Commission Scrutinize Suppliers. The operator of any licensed outlet shall keep the Commission informed in writing of the identity of suppliers and/or wholesalers who supply or are expected to supply tobacco or liquor stocks to the outlet(s). The Commission may, at its discretion, for any reasonable cause limit or prohibit the purchase of said stock from a supplier or wholesaler.

1-8.02 Freedom of Information From Suppliers. Operators shall in their purchase of stock and in their business relations with suppliers cooperate with and assist the free flow of information and data to the Commission from suppliers relating to the sales and business arrangements between the suppliers and operators. The Commission may, at its discretion, require the receipts from the supplies of all invoices, bills of lading, billings or other documentary receipts of sales to the operator.

1-9 Sales by Retail Operators.

1-9.01 Commission Regulations. The Commission shall adopt procedures which shall supplement these Regulations and facilitate their enforcement. These procedures shall include limitations on sales to minors, where liquor may be consumed, persons not allowed to purchase alcoholic beverages, hours and days when outlets may be open for business and other appropriate matters and controls.

1-9.02 Sales to Minors. No Tribal operator shall give, sell, or otherwise supply liquor to any person under twenty-one (21) years of age either for his or her own use or for the use of his or her parents or for the use of any other person.

1-9.03 Consumption of Liquor Upon Licensed Premises. No Tribal operator shall permit any person to open or consume liquor on his or her premises or any premises adjacent thereto and in his or her control. Provided the Commission will identify specific locations upon Tribal Trust Lands where beer and/or alcohol may be consumed.

1-9.04 Conduct on Licensed Premises.

(1) No Tribal operator shall be disorderly, boisterous or intoxicated on the licensed premises or on any public premises adjacent thereto which are under his or her control, nor shall he or she permit any disorderly, boisterous or intoxicated person to be thereon nor shall he or she use or allow the use of profane or vulgar language thereon.

(2) No operator shall permit suggestive, lewd, or obscene conduct or acts on his or her premises. For the purpose of this section, suggestive, lewd, or obscene acts or conduct shall be those acts or conduct identified as such by the laws of the State of Oklahoma.

1-9.05 Employment of Minors. No person under the age of twenty-one (21) years of age shall be employed in any service in connection with the sale or handling of liquor, either on a paid or voluntary basis, except as otherwise provided herein. Employees eighteen [18] years or older may sell or handle beer or wine provided that there is direct supervision by an adult twenty-one (21) years of age or older.

1-9.06 Operator's Premises Open to Commission Inspection. The premises of all operators, including vehicles used in connection with liquor sales, shall be open at all times to inspection by the Citizens Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission or its designated representative.

1-9.07 Operator's Records. The originals or copies of all sales slips, invoices, and other memoranda covering all purchases of liquor by operators shall be kept in file in the retail premises of the operator purchasing the same for at least five (5) years after each purchase and shall be filed separately and kept apart from all other records and as nearly as possible shall be filed in consecutive order and each month's records kept separate so as to render the same readily available for inspection and checking. All cancelled checks, band statements and books of accounting covering of involving the purchase of liquor, and all memoranda, if any, showing payment of money

for liquor other than by check, shall be likewise preserved for availability for inspection and checking.

1-9.08 Records Confidential. All records of the Citizen Band Potawatomi Indians of Oklahoma Tobacco Liquor and Beer Control Commission showing purchase of liquor by any individual or group shall be confidential and shall not be inspected except by members of the Commission or its authorized representative.

1-9.09 Conformity With State Law. Operators shall comply with State of Oklahoma liquor standards to the extent required by 18 USC 1161. However, total jurisdiction over the sale of liquor and beer products is reserved to and exercised by the Citizen Band Potawatomi Indians of Oklahoma Tobacco, Liquor and Beer Control Commission within the boundaries of Tribal Trust Lands.

1-10 Tribal Excise Tax Imposed Upon Distribution of Tobacco and Liquor.

1-10.01 Tribal Excise Taxes. The Commission shall by resolution include a provision for the taxing of sales of cigarettes, tobacco and liquor and beer products to the consumer or purchaser. Such tax shall be in amounts equal to at least 5% of all retail sales prices, but the Commission may establish tax rates in excess of that 5% for any given class of merchandise.

1-10.02 Added to Retail Price. The excise tax levied hereunder shall be added to the retail selling price of tobacco products and/or liquor and beer products sold to the ultimate consumer.

1-11 Liability for Bills.

1-11.01 Liability for Bills. The Tribe shall have no legal responsibility for any unpaid bills owed by a tobacco outlet and/or liquor and beer outlet to a wholesale supplier or any other person.

1-12 Other Business By Operator.

1-12.01 Other Business by Operator. An operator may conduct another business simultaneously with managing a tobacco outlet and/or liquor and beer outlet, PROVIDED, such other business must be approved prior to initiation by majority vote of the Citizen Band Potawatomi Indians of Oklahoma Business Committee. Said other business may be conducted on the same premises as a tobacco outlet and/or liquor and beer outlet, but the operator shall be required to maintain separate books of account for the other business.

1-13 Tribal Liability and Credit.

1-13.01 Operators are forbidden to represent or give the impression to any supplier or person with whom he or she does business that he or she is an official representative of the Tribe or the Commission authorized to pledge tribal credit or financial responsibility for any of the expenses of his or her business operation. The operator shall hold the Citizen Band Potawatomi Indians of Oklahoma harmless from all claims and liability of whatever nature. The Commission shall revoke an operator's outlet license(s) if said outlet(s) is not operated in a businesslike manner or if it does not remain financially

solvent or does not pay its operating expenses and bills before they become delinquent.

1-13.02 Insurance. The operator shall maintain at his or her expense adequate insurance covering liability, fire, theft, vandalism, and other insurable risks. The Commission or the Business Committee may establish as a condition of any license, the required insurance limits and any additional coverages deemed advisable.

1-14 Audit and Inspection.

1-14.01 All of the books and other business records of the outlet shall be available for inspection and audit by the Commission or its authorized representative for any reasonable time.

1-14.02 Bond For Excise Tax. The excise tax together with reports on forms to be supplied by the Commission shall be remitted to the Tribal office monthly unless otherwise specified in writing by the Commission. The operator shall furnish satisfactory bond to the Tribe in an amount to be specified by the Commission guaranteeing his or her payment of excise taxes.

1-15 Revocation of Operator's License.

1-15.01 Revocation of Operator's License. Failure of an operator to abide by the provision of these regulations and any additional regulations or requirements imposed by the Commission will constitute grounds for revocation of the operator's license as well as enforcement of the penalties provided in 1-16.

1-16 Violation - Penalties.

1-16.01 Any Indian violating these Regulations shall be guilty of an offense and subject to a fine of not less than fifty dollars (\$50.00) and not to exceed a maximum of two hundred-fifty dollars (\$250.00). Any operator who violates the provisions set forth herein shall forfeit all of the remaining stock in the outlet(s). The Tribe shall be empowered to seize forfeited products.

1-17 Separability.

1-17.01 If any provision of the Regulations in its application to any person or circumstance is held invalid the remainder of the Regulations and their application to other persons or circumstances is not affected.

EXHIBIT B

(SEAL)

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

2501 LINCOLN BLVD.

OKLAHOMA CITY, OKLAHOMA 73194

February 2, 1987

CINDY RAMBO, Chairman

ROBERT L. WADLEY, Vice-Chairman

DON KILPATRICK, Sec'y-Member

Business Tax

DIVISION

Alcohol &

Tobacco (illegible)

(405) 521-3270

Mr. John A. Barrett
DBA: Gallery Trading Post
Route 5, Box 151
Shawnee, OK 74801

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

RE: Proposed Assessment of Penalty
and Interest in the Amount of
\$2,691,470.70 for Sale and Distri-
bution of Unstamped Cigarettes

Dear Mr. Barrett:

From an examination and audit of reports, it appears that during the period from December 1, 1982 to September 30, 1986, you sold and/or distributed for consumption 6,134,380 packs of twenty cigarettes each, and 18,780 packs of twenty-five cigarettes each, without stamps affixed thereto as required by law. The amount of tax due upon the sale or distribution of said number of cigarettes is \$1,108,413.90.

Pursuant to the provisions of 68 O.S. 1981, Section 305(c) the Oklahoma Tax Commission hereby proposes the assessment against you of \$2,216,827.80, said sum being equal to twice the amount of the tax due, plus interest thereon to the date of this letter, in the amount of \$363,801.51 and penalty in the amount of \$110,841.39; for a total proposed assessment of \$2,691,470.70.

If you would wish to protest this proposed assessment, you may file a verified written protest, in triplicate, with the Alcohol and Tobacco Tax Division of the Oklahoma Tax Commission within thirty (30) days after the date of mailing this letter, as provided in 68 O.S. 1981, Section 221. If you fail to file a written protest within the thirty day period, this assessment will, without further action

by the Commission, become final and absolute at the expiration of thirty days from the date of mailing shown above. Such final assessment will accrue interest at the rate of eighteen percent (18%) per annum until paid, and further proceedings by way of tax warrant or court action may be had to enforce the state's lien.

Very truly yours,

OKLAHOMA TAX COMMISSION

/s/ Ray A. Freeman

Ray A. Freeman

OPERATIONS SUPPORT SECTION

RAF:ms

CIGARETTE AUDIT

JOHN A BARRETT DBA:
GALLERY TRADING POST
(Name of Firm)

SHAWNEE OK
(Address)

Period of Audit:

From DECEMBER 1982 Through SEPTEMBER 1986

RECAPITULATION

CIGARETTE STAMP ACCOUNT	25 PACK	20 PACK
	NUMBER OF STAMPS	
Stamps on Hand - Opening of Audit		
Purchases - Period of Audit		
Acquired from Other Sources		
TOTAL TO ACCOUNT		
DEDUCTIONS:		NONE
Stamps affixed to Packages		
Stamps Sold		
Other Dispositions		
Total Deductions		

ON HAND - CLOSE OF AUDIT

UNSTAMPED CIGARETTE ACCOUNT	NUMBER OF UNSTAMPED PACKAGES	
Stock on Hand - Opening of Audit	-0-	-0-
Packages Purchased -		
Period of Audit	18,780	6,134,380
Acquired from Other Sources		
Unaccounted For		
TOTAL TO ACCOUNT	18,780	6,134,380
DEDUCTIONS:		
Packages Stamped - Period of Audit		
Out of State Shipments		
Drop Shipments		
Sales to Government Agencies		
Returned to Factory		
Lost & Damaged SHORTAGES	18,780	6,134,380

Other Dispositions

TOTAL DEDUCTIONS	18,780	6,134,380
ON HAND - CLOSE OF AUDIT	-0-	-0-

STAMPED CIGARETTE

<u>ACCOUNT</u>	NUMBER OF STAMPED PACKAGES
----------------	----------------------------

Stock on Hand - Opening of Audit

Packages Stamped - Period of Audit

Stamped Cigarettes Purchased

TOTAL TO ACCOUNT

DEDUCTIONS: NONE

Sales to Licensed Retailers

TOTAL DEDUCTIONS

ON HAND - CLOSE OF AUDIT

ADDITIONAL LIABILITY	\$2,691,470.70
(EXPLANATION - PAGE 2)	

Last Stamp purchase order
used in this audit is No. NONE For _____ Stamps

1-30-87 Audited By: Ray A. Freeman
Date of Audit

CIGARETTE AUDIT PERIOD DEC 82 - SEPT 86

EXPLANATION OF LIABILITY:

UNSTAMPED PURCHASES OF 20 PACK

6,134,380 pkgs. @ 18¢ = \$1,104,188.40

18,780 pkgs. @ 22½¢ = 4,225.50

SUBTOTAL 1,108,413.90

SECTION 305, TITLE 68, OKLA. STATUTES 1,108,413.90

10% PENALTY 110,841.39

INTEREST TO FEB. 10, 1987 363,801.51

TOTAL \$2,691,470.70

POTAWATOMI TRIBAL STORE 01/29/87
GALLERY TRADING POST SHAWNEE, OKLA.

A-29

CIGARETTE PURCHASES

YEAR	MONTH	20 PACK	25 PACK	TAX DUE	PENALTY	INTEREST
1982	DECEMBER	77100	0	13878.00	1387.80	6800.22
1983	JANUARY	149400	0	26892.00	2639.20	12908.16
1983	FEBRUARY	90000	0	16200.00	1620.00	7614.00
1983	MARCH	93000	0	16740.00	1674.00	7700.40
1983	APRIL	142800	0	25704.00	2570.40	11566.80
1983	MAY	27600	0	4968.00	496.80	3278.88
1983	JUNE	59800	0	10764.00	1076.40	6942.78
1983	JULY	102900	0	18522.00	1852.20	11668.86
1983	AUGUST	102000	0	18360.00	1836.00	11291.40
1983	SEPTEMBER	104400	0	18792.00	1879.20	11275.20
1983	OCTOBER	121800	0	21924.00	2192.40	12825.54
1983	NOVEMBER	109200	0	19656.00	1965.60	11203.92
1983	DECEMBER	53400	0	9612.00	961.20	5334.66
1984	JANUARY	94200	0	16956.00	1695.60	9156.24
1984	FEBRUARY	111600	0	20088.00	2008.80	10546.20
1984	MARCH	93300	0	16794.00	1679.40	8564.94
1984	APRIL	107400	0	19332.00	1933.20	9569.34
1984	MAY	76200	0	13716.00	1371.60	6583.68
1984	JUNE	56100	0	10098.00	1009.80	4695.57
1984	JULY	105600	0	19008.00	1900.80	8553.60
1984	AUGUST	145500	0	26190.00	2619.00	11392.65
1984	SEPTEMBER	129600	0	23328.00	2332.80	9797.76
1984	OCTOBER	161100	0	28998.00	2899.80	11744.19
1984	NOVEMBER	181800	0	32724.00	3272.40	12762.36
1984	DECEMBER	80700	0	14526.00	1452.60	5447.25
1985	JANUARY	176100	0	31698.00	3169.80	11411.28
1985	FEBRUARY	104400	0	18792.00	1879.20	6483.24
1985	MARCH	197460	0	35542.80	3554.28	11729.12
1985	APRIL	132600	0	23868.00	2386.80	7518.42
1985	MAY	234000	0	42120.00	4212.00	12636.00
1985	JUNE	120000	0	21600.00	2160.00	6156.00
1985	JULY	233400	0	42012.00	4201.20	11343.24
1985	AUGUST	135900	900	24664.50	2466.45	6289.43
1985	SEPTEMBER	145800	0	26244.00	2624.40	6298.56
1985	OCTOBER	220500	720	39852.00	3985.20	8966.70
1985	NOVEMBER	118200	1200	21546.00	2154.60	4524.66
1985	DECEMBER	134700	0	24246.00	2424.60	4727.97
1986	JANUARY	308700	0	55566.00	5556.60	10001.88
1986	FEBRUARY	135840	0	24451.20	2445.12	4034.44
1986	MARCH	145200	2400	26676.00	2667.60	4001.40
1986	APRIL	214200	960	38772.00	3877.20	5234.22
1986	MAY	208320	1440	37821.60	3782.16	4538.59
1986	JUNE	46500	480	8478.00	847.80	890.19
1986	JULY	209160	3960	38539.80	3853.98	3468.58
1986	AUGUST	215100	3840	39582.00	3958.20	2968.65
1986	SEPTEMBER	121800	2880	22572.00	2257.20	1354.32
TOTALS		6134380	18780	1108413.90	110841.39	363801.51
		GRAND TOTAL				1583056.80

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND)	
POTAWATOMI INDIAN)	
TRIBE OF OKLAHOMA,)	
)	
Plaintiff)	
)	
vs.)	
)	
THE OKLAHOMA TAX)	
COMMISSION;)	
CINDY RAMBO, Chairman of the)	No. CIV-87-0338W
Tax Commission; ROBERT L.)	
WADLEY, Vice-Chairman of the)	
Tax Commission; and DON)	
KILPATRICK, Secretary of the)	
Tax Commission,)	
)	
Defendants.)	

ANSWER AND COUNTER-CLAIM

(Filed Mar 19, 1987)

COMES NOW the Defendants above named, and for
their Answer and Counter-Claim, allege and state:

ANSWER

I

Defendants admit that jurisdiction and venue are
properly before this Court.

B-2

II

Defendants admit that Plaintiff is a federally recognized tribe. The defendants are without knowledge as to the precise location of Plaintiff's headquarters and therefore deny that the same is located on Indian country as alleged in Paragraph 3 of plaintiff's complaint.

III

Defendants admit the allegations contained in Paragraph 4 except that Defendants deny that Cindy Rambo is a member of the Oklahoma Tax Commission.

IV

Defendants deny the allegations contained in Paragraph 5 of plaintiff's complaint.

V

The Defendants admit that portion of the facts and allegations contained in Paragraph 6 of plaintiff's complaint which alleges that plaintiff has adopted a constitution establishing a tribal government. Defendants are unaware of amendments to the constitution and therefore deny the last sentence of Paragraph 6.

VI

Defendants admit the allegations contained in Paragraphs 7, 8, and 9 of plaintiff's complaint.

B-3

VII

Defendants admit that plaintiff has never had a license to sell cigarettes as alleged in Paragraph 10 of plaintiff's complaint. Defendants deny the remainder of Paragraph 10.

VIII

Defendants admit the allegations contained in Paragraphs 11, 12 and 13 of plaintiff's complaint, and further allege that the Defendant, Oklahoma Tax Commission, intends to proceed with collection efforts against plaintiff for cigarette excise taxes due the State of Oklahoma.

IX

Defendants are without knowledge of the truth or accuracy of the allegations contained in Paragraphs 14 and 15 of plaintiff's complaint. However, Defendants state that these allegations are irrelevant.

X

Defendants deny the allegations contained in Paragraph 16 of plaintiff's complaint in so far as the notification by letter is alleged to be an assessment. Defendant alleges the notification is a proposed assessment which may be duly protested pursuant to state law. Paragraph 16 in all other respects is admitted.

XI

Defendants admit the allegations contained in Paragraphs 17, 18 and 19 of plaintiff's complaint and further allege that John Barrett had filed a protest with the Oklahoma Tax Commission prior to the commencement of this action by Plaintiff; that said letter of protest had been reviewed and the proposed assessment was in the process of being withdrawn at the time plaintiff's action was filed, because the proposed assessment as issued contained clerical errors.

XII

Defendants admit that Barrett does not do business as The Gallery Trading Post as alleged in Paragraph 20 of plaintiff's complaint, however, Defendants deny the remainder of Paragraph 20.

XIV

Defendants state that the allegations in Paragraph 22 of plaintiff's complaint are overly broad and cannot be admitted or denied.

XV

Defendants deny the allegations contained in Paragraphs 23, 24 and 25 of plaintiff's complaint and further state that these allegations are now moot because the proposed assessment against plaintiff's officer has been withdrawn.

XVI

Defendants deny the allegations contained in Paragraphs 26 and 27 of plaintiff's complaint.

WHEREFORE, Defendants pray that plaintiff be denied this injunctive relief requested in the Complaint.

COUNTER-CLAIM

For its Counter-Claim against the plaintiff herein, Defendants allege and state:

I

That jurisdiction and venue are properly before this Court.

II

CAUSE OF ACTION
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

A. This counter-claim is brought pursuant to Rule 18(a) of the Federal Rules of Civil Procedure.

B. That Plaintiff has sold and continues to sell cigarettes within the State of Oklahoma to the general public upon which State cigarette excise tax and sales tax has not been paid.

C. That said actions of the Plaintiff are in violation of the State's laws and the federal common law as set forth in Moe v. Confederated Salish and Kootenai Tribes, 425

U.S. 463 (1976), Washington v. Confederated Tribes of Colville, 447 U.S. 134 (1980) and California State Board of Equalization v. Chemehuevi Indian Tribe, ___ U.S. ___, 106 S.Ct. 289 (1985).

D. As a result of the actions of the Plaintiff, the Defendants have suffered and continue to suffer immediate and irreparable harm for which declaratory and injunctive relief must be granted.

E. The Defendants ask that this Court:

1. Assume and maintain jurisdiction over these matters.
2. Issue an Order declaring and setting forth the respective rights and jurisdictions of the Parties.
3. Issue an Order declaring that the jurisdiction of the Defendant Oklahoma Tax Commission extends to taxing the Plaintiff's sales.
4. Issue an Order declaring that the jurisdiction of the Defendant Oklahoma Tax Commission extends to enforcing its tax laws by way of assessments and injunctions.
5. Issue an Order enjoining Plaintiff from selling cigarettes upon which State excise tax and sales tax are not collected and remitted.
6. Grant all costs, fees, and other relief as the facts and the interests of justice may warrant to these Defendants.

Respectfully submitted,
OKLAHOMA TAX COMMISSION
J. LAWRENCE BLANKENSHIP
General Counsel

By: /s/ Robert C. Jenkins
Robert C. Jenkins
2501 Lincoln Boulevard
Oklahoma City, OK 73194
(405) 521-3141
Attorney for Defendants

CERTIFICATE OF MAILING

I certify that on the 18th day of March, 1987, a true and correct copy of the above and foregoing was mailed to:

Michael Minnis and David McCullough
Pierson, Ball and Dowd
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102

/s/ Robert C. Jenkins
Robert C. Jenkins

sb

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BANK)	
POTAWATOMI INDIAN)	
TRIBE OF OKLAHOMA,)	
Plaintiff,)	
)	
v.)	
THE OKLAHOMA TAX)	
COMMISSION;)	
CINDY RAMBO, Chairman of the)	CIV-87-0338-W
Oklahoma Tax Commission;)	
ROBERT L. WADLEY, Vice-)	
Chairman of the Tax)	
Commission; and DON)	
KILPATRICK,)	
Secretary of the Tax Commission,)	
Defendants.)	

ORDER

(Filed May 29, 1987)

This matter comes before the Court on the plaintiff's Motion to Dismiss Counterclaim wherein dismissal is sought on the grounds that this Court is without jurisdiction over the counterclaim, that this Court is without jurisdiction over the plaintiff for purposes of the counterclaim and that the defendants have failed to state a counterclaim upon which relief in this Court can be granted.

The defendants, Oklahoma Tax Commission, Cindy Rambo, then Chairman of the Oklahoma Tax Commission, Robert L. Wadley, Vice-Chairman, and Don Kilpatrick, Secretary, have responded in opposition to the motion, and based upon the parties' submissions, the Court makes the following determination.

The plaintiff, The Citizen Bank Potawatomi Indian Tribe of Oklahoma, is a federally-recognized Indian tribe which brought this action to enjoin the defendants from enforcing or attempting to enforce the regulatory and taxing authority of the state of Oklahoma to assess a cigarette tax against the plaintiff. The lawsuit was prompted by a proposed tax assessment (since amended and now directed towards the plaintiff) which was issued by the defendants and which advised the plaintiff that it owed certain amounts, including a penalty, for its sale of cigarettes without stamps affixed to the packages as required by Oklahoma law.

The defendants answered the plaintiff's allegations in its complaint and also counterclaimed against the plaintiff. The relief sought in the counterclaim is a declaration that the plaintiff's actions in selling packages of cigarettes without stamps affixed thereto is violative of Oklahoma law and to enjoin the plaintiff from continuing this practice.

The plaintiff has argued first that this Court is without subject matter jurisdiction over the counterclaim because it is a permissive counterclaim and there is no independent jurisdictional basis for the same alleged by the defendants. Despite the plaintiff's characterization of the pleading, the Court finds that the counterclaim is a

compulsory counterclaim, Rule 13(a), Fed. R. Civ. P. ("arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"), and thus needs no independent jurisdictional basis.

The plaintiff has also argued pursuant to Rule 12(b)(6), Fed. R. Civ. P., that the counterclaim has failed to state a claim for relief and in particular that the relief sought by the defendants is available in state administrative proceedings and thus not available in this forum. The Court is aware of the existence of the state proceeding but in light of the compulsory nature of the counterclaim, the Court finds not only that the defendants have stated a counterclaim upon which relief can be granted but also that the defendants are not precluded from litigating such claim in this forum.

The plaintiff has finally argued that this Court cannot exercise in personam jurisdiction over this plaintiff for purposes of the counterclaim due to the bar imposed by sovereign immunity. The plaintiff has contended that it has submitted to this Court's jurisdiction only for the limited purpose of securing the equitable relief it seeks but that it has not consented to suit on the defendants' counterclaim.

The Court is aware that generally no affirmative relief may be given against a sovereign absent its consent. Nevertheless, in this instance, the Court finds that the relief sought by the defendants is so intertwined with the relief sought by the plaintiff that the counterclaim falls within the scope of waiver contained in the plaintiff's complaint. *E.g., Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (when sovereign sues it waives

immunity as to claims of defendant which assert matters in recoupment - arising out of same transaction or occurrence and to the extent of defeating sovereign's claim but not to extent that claim seeks relief which is different in kind or nature).

Accordingly, the Court finds that it has jurisdiction over both the subject matter of the counterclaim and the plaintiff/counterclaim defendant and that the plaintiff's Motion to Dismiss should be and is hereby DENIED.

IT IS SO ORDERED this 29th day of May, 1987.

/s/ Lee R. West
 LEE R. WEST
 United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CITIZEN BAND
POTAWATOMI INDIAN
TRIBE OF OKLAHOMA,

Plaintiff,

v.

THE OKLAHOMA TAX
COMMISSION; CINDY
RAMBO, CHAIRMAN OF THE
TAX COMMISSION; ROBERT L.
WADLEY, VICE-CHAIRMAN OF
THE TAX COMMISSION; AND
DON KILPATRICK, SECRETARY
OF THE TAX COMMISSION,

Defendants.

No. CIV-87-0338W

JUDGMENT

(Filed Jan 4, 1990)

On November 29, 1989, mandate from the United States Court of Appeals for the Tenth Circuit was filed in the above-styled case. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th Cir. Okl. 1989). Subsequently, plaintiff moved for judgment consistent therewith. Accordingly, consistent with the mandate, this Court hereby finds and concludes as follows:

FINDINGS OF FACT

Indian County

1. The plaintiff, The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Citizen Band"), is a federally-recognized Indian tribe organized under the provisions of the Oklahoma Indian Welfare Act of June 26, 1936, and is duly recognized as an Indian tribe by the United States Secretary of the Interior (the Secretary).

2. The defendants are the Oklahoma Tax Commission and its appointed members acting in their official capacities.

3. The Potawatomi Indians originally resided around the Great Lakes in Indiana, Illinois, Wisconsin and Michigan.

4. The "Pottowautomie Nation" was removed by the Treaty of June 5 and 17, 1846, to a thirty-square-mile reservation in Kansas.

5. Pursuant to the Treaty of November 15, 1861 (as amended by the Treaty of March 29, 1866), the reservation was divided into individual allotments. When the sale of these allotments produced poverty, the Potawatomi Indians were divided into two bands - the Prairie Band, which remained in Kansas, and the Citizen Band, which was removed to Oklahoma.

6. The Treaty of February 27, 1867, provided for a thirty-square-mile tract in Oklahoma for the Citizen Band. This area was approved as a reservation on November 9, 1870, by the Secretary and it included most of Pottawatomie County, part of eastern Cleveland

County, part of southeastern Oklahoma County and a few acres in southwestern Lincoln County.

7. On May 23, 1872, the Citizen Band agreed to have a portion of its reservation allotted to tribal members. The allotments began in 1875 and continued for fifteen years until the passage of the General Allotment Act of 1887 (The Dawes Act). In 1891, the Citizen Band reservation was divided into allotments; unallotted land either was considered "surplus" and sold to non-Indians or was retained by the federal government.

8. On September 13, 1960, the federal government after concluding certain of this retained land was also surplus, conveyed to the Citizen Band 57.99 acres in Pottawatomie County. The legislation authorizing this conveyance stated that the property would be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership.

9. On August 11, 1964, the federal government conveyed seven additional tracts, 255.196 acres, to the Citizen Band in Pottawatomie County. The legislation conveying these seven tracts as it pertained to tracts numbered six and seven likewise stated that these tracts were not exempt from taxation or restriction on use, management or disposition because of Indian ownership.

10. On September 16, 1971, the Citizen Band by resolution asked the federal government to accept all conveyed land in trust. This resolution expressly noted that the lands to be conveyed to the federal government were subject to no restrictions because of Indian ownership and requested that the lands should be redesignated restricted lands.

11. On February 18, 1974, the Mayor and the Board of Commissioners of the City of Shawnee passed a resolution wherein they endorsed the Citizen Band's request for trust status of the land.

12. On January 2, 1975, Congress authorized the Citizen Band to convey seven tracts, 279.956 (the 57.99 acres included in the 1960 conveyance and the first six tracts included in the 1964 conveyance) to the United States in trust for the benefit and use of the Citizen Band.

13. On May 27, 1976, this was accomplished.

14. The Citizen Band owns and operates a convenience store called the "Potawatomi Tribal Store a/k/a The Gallery Trading Post". The store was constructed by the Citizen Band with federal funds secured from a Community Development Block Grant program sponsored by the United States Department of Housing and Urban Development.

15. The land upon which this tribal store is located was included in the unallotted land that was retained by the federal government in 1891. It was held by the federal government until 1964 when it was included in the 255.196 acres conveyed to the Citizen Band. It was then returned to the federal government in trust for the benefit and use of the Citizen Band in 1976.

Taxation

16. The tribal store sells packages of cigarettes to all persons of legal age.

17. No records are kept which distinguish between sales to tribal members, other Indians and non-Indians.

18. Under Oklahoma law, the defendants enforce state taxing laws including a cigarette tax which requires those selling cigarettes in the State of Oklahoma to be licensed and to purchase and affix state tax stamps before selling cigarettes.

19. The Citizen Band has never purchased a license to sell cigarettes from the State of Oklahoma.

20. The Citizen Band does not and has never collected state sales tax on packages of cigarettes.

21. The Citizen Band imposes a tribal tax on the cigarettes sold and all packages of cigarettes sold bear a tribal tax stamp.

22. The Citizen Band's tobacco ordinance has been approved by the Department of Interior-Bureau of Indian Affairs.

23. The money generated by the sale of cigarettes goes into the tribal general fund for the use and benefit of the Citizen Band.

24. As of September 30, 1985, gross annual sales for the tribal store totalled \$1,764,704.00 and the Citizen Band had gross annual operating revenues from all sources of \$2,158,906.00.

25. On March 5, 1987, the Citizen Band received a proposed assessment in the amount of \$2,671,470.70 for state cigarette taxes allegedly due for cigarette sales at the tribal store from December 1, 1982, to September 30, 1986.

26. The Citizen Band is only seeking injunctive relief. The Citizen Band is not seeking a declaratory judgment or damages. *Citizen Band Potawatomi Indian Tribe, supra p. 1305.*

CONCLUSIONS OF LAW Indian Country

1. "Indian Country" has been defined, in part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States government . . .," 18 U.S.C. § 1151(a). Although this statute was enacted for purposes of determining federal criminal jurisdiction, it is equally applicable in civil cases. *E.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 206 n. 5 (1987).

2. Because validly set apart for use by the Tribe, the Citizen Band's original reservation was Indian Country. *See doc. no. 52, order, p. 6, filed 4/15/88* (hereafter "April 15th Order").

3. The term "Indian reservation" has been used in various ways and "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status." *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987). The Tenth Circuit noted that:

For purposes of defining Indian Country, the term simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.

Id.

4. "[L]ands held in trust by the United States for the tribes are Indian Country within the meaning of § 1151(a)." *Cheyenne-Arapaho Tribe v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980).

5. The Potawatomi Tribal Store, a/k/a/The Gallery Trading Post, is located on land which is "located within the original Potawatomi reservation boundaries" and which, "during all relevant periods of time, was held in trust by the federal government" for the Citizen Band. Thus, the store is "located in Indian Country". *Citizen Band Potawatomi Indian Tribe*, *supra* p. 1306.

Taxation

6. Oklahoma has disclaimed jurisdiction over Indian land. *See Indian County*, 829 F.2d at 976-81. The effect of this disclaimer of jurisdiction "is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished". *Id.* at 980 (quoting S. Rep. No. 699, 83d Cong., 1st Sess., reprinted in [1953] U.S. Code & Admin. News 2409, 2412).

7. Oklahoma has not asserted jurisdiction over Indian Country under Public Law 280, nor pointed to a "voluntary grant of jurisdiction" by the Citizen Band. *Citizen Band Potawatomi Indian Tribe*, *supra* p. 1307.

8. Because the convenience store is located in Indian Country, the Citizen Band possesses "sovereign powers with respect to the land and the store. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978)." *Citizen Band Potawatomi Indian Tribe*, *supra* p. 1306.

9. Because the convenience store is located on land over which the Citizen Band retains sovereign powers, "Oklahoma has no authority to tax the store's transactions" absent "an independent jurisdictional grant of authority from Congress". *Id.*

10. The Citizen Band is not only exempt from payment of state sales tax (such exemption is recognized and acknowledged by the defendants' pleadings to this Court) but also is immune from liability for the assessment issued by defendants on March 5, 1987 for taxes due for sale of cigarettes from December 1, 1982 to September 30, 1986. *April 15th Order*, *supra* p. 9. The instant assessment against the Citizen Band for payment of cigarette sales tax unremitted from 1982 to 1986 is improper. *Id.* at 12.

11. Absent injunctive relief, the Citizen Band will suffer irreparable damage.

12. The Citizen Band has no adequate remedy at law.

Counterclaim

13. "Indian tribes have sovereign immunity from suits to which they do not consent, subject to the plenary control of Congress." *Citizen Band Potawatomi Indian Tribe*, *supra* p. 1304; citing *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165, 172-73 (1977).

14. An Indian tribe "does not consent to suit on a counterclaim merely by filing as a plaintiff". *See Fidelity & Guaranty Co.*, 309 U.S. at 513. "Although the precise limits

of this tribal immunity are not clear, . . . it is generally co-extensive with that of the United States." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

15. The "compulsory counterclaim requirement of Rule 13(a) of the Federal Rules of Civil Procedure cannot be viewed as a Congressional waiver of the Tribe's immunity. . . . Rule 13(a) is explicitly intended to require joinder of only those claims that might otherwise be brought separately." *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047, 1053 (9th Cir.), *rev'd. on other grounds*, 474 U.S. 9 (1989).

16. Although a "counterclaim may be asserted against a sovereign by way of set-off or recoupment to defeat or diminish the sovereign's recovery, no affirmative relief may be given against a sovereign in the absence of consent." *United States v. Agnew*, 423 F.2d 513, 514 (9th Cir. 1970).

17. Recoupment is an equitable defense that applies only to suits for money damages. "[R]ecoupment is purely defensive and not offensive . . . [and applies] only to abatement, reduction, or mitigation of the damages claimed by plaintiff." 80 C.J.S. *Set-Off and Counterclaim*, § 2 (1953) (*emphasis added*). Because of the tribal immunity from suit, this Court has no jurisdiction "to adjudicate the counterclaim". *Citizen Band Potawatomi Indian Tribe*, *supra* p. 1305.

Therefore, in accordance with the findings of fact and conclusions of law had herein, IT IS ORDERED AND ADJUDGED:

1. That, to the extent inconsistent herewith, the order of this Court filed herein on April 15, 1988 is hereby VACATED;

2. That the judgment of this Court entered on May 6, 1988 is hereby VACATED;

3. That the defendants are immediately and permanently ENJOINED from assessing any state sales taxes against and/or collecting any state sales taxes from the plaintiff;

4. That the defendants, their officers, agents, servants, employees, attorneys, and all those in active concert or participation with them, are permanently ENJOINED from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe, the Tribe's officers, agents or employees;

5. That the defendants' counterclaim for declarative and injunctive relief is DISMISSED;

6. That the plaintiff is awarded its costs herein.

Consistent with *Local Rule 6(E)*, plaintiff has fifteen (15) days after entry of this judgment to file an application for costs.

Dated at Oklahoma City, Oklahoma, this 4th day of January, 1990.

/s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT
JUDGE

ENTERED IN JUDGEMENT DOCKET ON 1-4-90

APPENDIX E

OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

2501 LINCOLN BLVD.
OKLAHOMA CITY, OKLAHOMA 73194

May 3, 1978

JAMES E. WALKER, Chairman	Sales/Use
JOHN L. GARRETT, Vice-Chairman	
J. L. MERRILL, Sec'y-Member	DIVISION

Citizen Band Potawatomi Indians
of Oklahoma
Route 5, Box 151
Shawnee, Oklahoma 74801

Attention: Ms. Rebecca Cryer
Tribal Administrator

Gentlemen:

In reply to your letter of April 26, 1978, please be advised we recognize the Citizen Band Potawatomi Indians of Oklahoma as being exempt from sales tax on your purchases of tangible personal property under the provisions found in Paragraph (i), Section 1305, Article 13, Title 68, O. S. 1971.

You have our permission to reproduce this letter and furnish to your suppliers as evidence of your statutory exemption.

Very truly yours,

OKLAHOMA TAX COMMISSION

/s/ Marvin Jensen
Marvin Jensen
Sales & Use Tax Division

MJ:mbe

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)	
OKLAHOMA EMPLOYMENT)	
SECURITY COMMISSION,)	
Plaintiff,)	
v.)	No.
)	CIV-88-595-A
CHOCTAW NATION OF OKLAHOMA,)	
SEMINOLE NATION OF OKLAHOMA,)	
KIOWA-COMANCHE-APACHE)	
INTERTRIBAL LAND USE)	
COMMITTEE, and PAWNEE TRIBAL)	
RESERVE ENTERPRISE,)	
Defendants.)	

ORDER

(Filed January 4, 1989)

Under Rule 11 Fed. R. Civ. P., the defendants in the captioned case apply to the Court for an award of costs and attorney's fees. Generally, the defendants contend that the plaintiff's declaratory judgment action was frivolous because, under well-settled principles of sovereign immunity, Indian tribes cannot be sued.¹ The Court has

¹ In April 1988, the plaintiff filed the instant action, seeking a declaration that 26 U.S.C. §3305(d) authorized Oklahoma to impose unemployment compensation taxes on Indian tribes and their instrumentalities. In August 1988, the Court dismissed the case on jurisdictional grounds. The Court observed that the plaintiff's Complaint did not allege a waiver of sovereign immunity by the Indian defendants or "any effective congressional abrogation of it."

considered the parties' submissions, as they pertain to the Rule 11 question. For the reasons noted below, the defendants' application for costs and attorney's fees is granted.

Under Rule 11, courts are obligated to impose sanctions on parties or their attorneys, or both, for the filing of frivolous pleadings – that is, pleadings that are unwarranted by existing law or good faith arguments for the extension, modification, or reversal of existing law. *See, e.g., Chevron USA, Inc. v. Hand*, 763 F.2d 1184, 1186-87 (10th Cir. 1985); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §§1333-34 (1969 & Supp. 1987). However, Rule 11 sanctions are not imposed lightly. Eschewing the wisdom of hindsight, courts merely require that the pleadings state "a plausible view of the law." Fed. R. Civ. P. 11 advisory committee's note; *see Eastway Construct. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985), *cert. den.*, 108 S.Ct. 269 (1987); *Gilmer v. City of Cleveland*, 617 F.Supp. 985, 988-89 (N.D. Ohio 1985); *Johnson v. Veterans Administration*, 107 F.R.D. 626, 628 (N.D. Miss. 1985).

Under the substantive law at issue, Indian tribes are, indeed, sovereign nations and, as such, cannot be sued. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); F. Cohen, *Handbook of Federal Indian Law* 324 (1982 ed.); *see also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1072 (1982) [hereinafter *Tribal Immunity*] (discussing the traditional policy bases for tribal sovereign immunity). The plaintiff argues, however, that its declaratory judgment action was reasonable given the Supreme Court's decision in *National Farmers Union Ins. Co. v. Crow Tribe*, 105 S.Ct. 2447 (1985). The *National Farmers* Court held that federal question jurisdiction supported the non-Indian plaintiff's suit against an Indian

tribe, which was aimed at escaping the civil jurisdiction of the tribal court, because the scope of tribal sovereignty as to non-Indians has traditionally been a matter of federal law, including federal common law. 105 S.Ct. at 2451-52. Based on *National Farmers*, apparently, the plaintiff reasons that this Court could have reasonably entertained its lawsuit against the otherwise immune Indian tribes because a federal question bearing on tribal sovereignty was presented by the plaintiff's action – namely, the construction of 26 U.S.C. §3305(d). *See supra* note 1.

Even assuming that the plaintiff's reasoning from the *National Farmers* case is plausible, however, the plaintiff's reliance on that case here is misguided because, in fact, under well-settled jurisdictional principles, the plaintiff's action does not present a federal question.² That is, under the well-pleaded complaint rule, the plaintiff's Complaint does not evidence federal law as an essential element of the plaintiff's lawsuit. *See Arden-Mayfair, Inc. v. Louart Corp.*, 434 F.Supp. 580, 583 (D. Del. 1977); 10A C. Wright,

² The plaintiff's reasoning from the *National Farmers* case is weak, if not implausible, for at least two reasons. First, the sovereign immunity issue was not before the *National Farmers* Court and no language of the decision addresses the issue. Second, under the plaintiff's reasoning, courts could presumably reach the merits of any lawsuit against Indian tribes that involves a federal question implicating tribal sovereignty. Yet, judicial incursions on the sovereign immunity doctrine have been few and narrowly tailored. *See Santa Clara Pueblo*, 436 U.S. at 55-60; *Dry Creek Lodge, Inc. v. Arapahoe & Soshone Tribes*, 623 F.2d 682, 685-86 (10th Cir. 1980) (Holloway, J., dissenting); *Tribal Immunity, supra*, at 1062-64.

A. Miller & M. Kane, *Federal Practice & Procedure* §2767 (1983); see also *Gully v. First National Bank*, 299 U.S. 109, 113-14 (1936). True, on its face, the plaintiff's Complaint seeks a declaration as to the plaintiff's rights under a federal statute. This fact, however, is not determinative on the jurisdictional issue. See *Franchise Tax Bd. v. Construc. Laborers Vac. Trust*, 463 U.S. 1, 19-23 (1983). As plaintiff concedes, at bottom, its cause of action is based on Oklahoma tax law. See Plaintiff's Brief in Support of Objection to Motion to Dismiss, at 2-3. The sovereign immunity issue and any contrary allegations of waiver logically arise only in the context of a defense to the plaintiff's state-law cause of action and, consequently, are outside the scope of a well-pleaded complaint.³

As one commentator observed, "[t]he most important of the justifications for tribal immunity is the need to protect tribal assets." *Tribal Immunity*, *supra*, at 1073. By initiating its declaratory judgment action, the plaintiff imposed needless costs on the Indian defendants. To be sure, in imposing Rule 11 sanctions, courts must be wary of chilling the creativity of counsel "that is the very lifeblood of the law." *Eastway Construc. Corp.*, 762 F.2d at 254. However, before undertaking its challenge, based on the *National Farmers* decision, to the well-established doctrine of tribal immunity, it was incumbent upon the plaintiff to reasonably inquire into the presence of the

³ As for the importance of the federal-question predicate in the *National Farmers* decision, the Court noted that: "it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It was, however, necessary to assert a claim 'arising under' federal law." 105 S.Ct. at 2451.

jurisdictional predicate for its argument, a federal question. Thus, the Court grants the defendants' application for costs and attorney's fees. The defendants are directed to submit their bills of costs and documented applications for reasonable attorney's fees no later than Jan. 19, 1989.

It is so ordered this 4th day of January, 1989.

/s/ Wayne E. Alley
 WAYNE E. ALLEY
 United States District Judge

APPENDIX G
OPINION NO. 82-22

The Honorable Lonnie L. Abbott September 23, 1982
State Representative

The Attorney General has received your request for an official opinion in which you ask, in effect, the following question:

Is the Chickasaw Indian Tribe an "employer" required by 85 O.S. 1981, § 2b or § 11, to carry Workers' Compensation Insurance on its employees?

The provisions of 83 O.S. 1981, § 11 require all "employers" in the State of Oklahoma to carry Workers' Compensation Insurance upon their employees in one of a number of delineated manners. The term "employer", as it is used in the Workers' Compensation Act, 85 O.S. 1981, § 1 et seq., is defined in Section 3(3) of the Act, which provides:

"(3) 'Employer', except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, employing a person included within the term 'employee' as herein defined."

In addition to this definitional list of "employers" affected by this Act, Title 85 O.S. 1981, § 2b also requires certain subdivisions and political entities of the State to

carry Workers' Compensation Insurance. Section 2b provides, in pertinent part:

"All departments, instrumentalities and institutions of this state and divisions thereof, counties and divisions thereof, public trusts, boards of education and incorporated cities or towns and divisions thereof, shall carry Workers' Compensation Insurance on each employee, whether engaged in a governmental or proprietary function. . . ."

Resolution of your question is dependent upon a determination of the status of the Chickasaw Indian Tribe and whether or not the Tribe is a private or public employer covered by the terms of these provisions. It has long been established that Indian tribes are not subdivisions of any state, but, rather, are "domestic, dependent nations" independent of any state government. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir., N.S. Okl. 1971); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir., E.D. Okl. 1951); *Bell v. Phillips Petroleum Co.*, Okl., 641 P.2d 1115, 1119, n.13 (1982). The Chickasaw Indian Nation, in particular, has been so identified as a domestic, dependent nation. See *Choctaw Nation and Chickasaw Nation v. Atchison, T. & S. F. Ry. Co.*, 396 F.2d 578, 581 (10th Cir., E.D. Okl. 1968).

From the above-cited authority, it is evident that the Chickasaw Indian Nation is neither a private entity nor a department, instrumentality or institution of the State or any subdivision thereof. The list of enumerated entities who are subject to the Workers' Compensation Act's provisions outlined in 85 O.S. 1981, § 3(3), above, makes no mention of Indian Nations. Similarly, the language of 85 O.S. 1981, § 2b, above, dealing with entities who employ

public employees does not purport to include Indian Nations within its terms. Further, while the term "person" may, in some instances, be construed to include governmental entities, *see generally* 32 WORDS AND PHRASES, "Person" (Perm. Ed. and Supp. 1982), the generally accepted rule is that, absent evidence of a manifest intent by the legislative branch to include governmental entities as "persons" affected by statutory direction, such governmental entities are not so affected. *Id. See also, Cocco v. Maryland Comm. on Medical Discipline*, 39 Md.App. 170, 384 A.2d 766 (1978); *Towner v. Jimerson*, 67 A.D. 2d 817, 413 N.Y.S. 2d 56, 58 (N.Y. App. Div. 1979); *City of Charleston v. Southeastern Const. Co.*, 134 W.Va. 666, 64 S.Ed.2d 676, 682 (1951). A fundamental rule of statutory construction is that to include by specific identification one thing in a description and not to include another is to exclude that latter from the purview of the statute. *Spiers v. Magnolia Pet. Co.*, 206 Okl. 510, 244 P.2d 852 (1952); *State v. Cline*, Okl.Cr., 322 P.2d 208 (1958). While the Workers' Compensation Act will receive a liberal construction in favor of those for whose protection it was enacted, its purview may not be extended beyond the classes actually embraced within its terms. *Snyder Const. Co. v. White*, Okl., 383 P.2d 674 (1963).

It is, therefore, the official opinion of the Attorney General that your question be answered as follows:

The Chickasaw Indian Tribe is not an "employer" required by 85 O.S.1981. §§ 2b or 11, to carry Workers' Compensation Insurance on its employees.

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma
MICHAEL SCOTT FERN
Assistant Attorney General
